CONSTITUTIONAL OPINIONS

The Second Amendment, Incorporated

By Ross Kaminsky on 6.29.10 @ 6:09AM

On Monday morning, the Supreme Court handed down its decision in the case of *McDonald v Chicago*, a follow-on case to the *Heller* case in which the Court ruled that the right to keep and bear arms is an individual, not a collective, right. Following *Heller*, Chicago and a few other localities argued that since that case had been about the District of Columbia's ban, it was not clear that the Court's ruling applied to states and other non-federal territory.

With its 5-4 decision in *McDonald*, the Court says that the right applies everywhere in the U.S., that the right to keep and bear arms applies equally in cities and states as in D.C. The 5-4 decision comprised a plurality made up of Justices Alito, Roberts, Scalia, and Kennedy who were joined by Justice Thomas in a separate opinion upholding the outcome of the case but not the path the plurality took to get there. (More later on this important disagreement within the Court's "conservative" wing.) Although the Court's ruling is clearly the right one, two aspects of the decision are troubling.

First, while I might understand how the Court's liberals opposed the original *Heller* decision, which found that individuals have rights under the Second Amendment, the fact that those same liberals would then argue that a settled right somehow does not apply to the states is remarkable, particularly given how almost every constitutional right we have based on the original Bill of Rights has been interpreted by the Court to be "incorporated" via the 14th Amendment's "Due Process" clause.

In their controlling opinion, the plurality point out that "Municipal respondents' remaining arguments are rejected because they are at war with Heller's central holding. In effect, they ask the Court to hold the right to keep and bear arms as subject to a different body of rules for incorporation than the other Bill of Rights guarantees."

In his dissent from this decision, Justice Breyer made several complaints about it, each of which the plurality thoroughly disassembles. Two of those complaints are particularly interesting: First, "'there is no popular consensus' that the right is fundamental." Beyond the fact that Breyer's statement is wrong, the Court makes the key point that "we have never held that a provision of the Bill of Rights applies to the States only if there is a 'popular consensus' that the right is fundamental, and we see no basis for such a rule."

Breyer's argument is disturbingly similar to Supreme Court nominee Elena Kagan's statement that "Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs." Kagan's argument is, as Chief Justice John Roberts accurately described, "startling and dangerous." Breyer's argument isn't much different: essentially that a fundamental American right should be upheld or not upheld based on whether that right is "popular," essentially just another version of subjecting a right to a verdict by "society."

Breyer (along with Justice Stevens in a separate dissent) also suggested that the Court should not interfere in this particular area of state versus federal government relationship. This from people who can't even spell "federalism " except when they can use it to limit freedom. The Court's plurality in McDonald offered this retort:

> ...incorporation of the Second Amendment right will to some extent limit the legislative freedom of the States, but this is always true when a Bill of Rights provision is incorporated. Incorporation always restricts experimentation and local variations, but that has not stopped the Court from incorporating virtually every other provision of the Bill of Rights.

Additionally, in response to the similar point made by Justice Stevens, the majority notes that "The relationship between the Bill of Rights' guarantees and the States must be governed by a single, neutral principle." You don't say.

The sadly accurate implication of the majority's comment on the dissents is that the "liberal" dissenters simply do not believe in the rule of law. They believe in decisions based on a desired outcome at a given time based on no particular fundamental principle.

It is remarkable that all of the Court's liberals voted against applying our Second Amendment rights within the states even after the Court had ruled that the Second Amendment did guarantee a fundamental right. Just as they only consider federalism when it involves restricting constitutional rights, they also only respect even the most recent precedent when they're happy with the outcome. Indeed, Justice Scalia offers an extremely harsh and sarcastic view of Stevens' dissent, saying that Stevens somehow just "*knows* that the right to keep and bear arms is out (while)...only '*some* fundamental aspects of personhood, dignity and the like' are protected." In other words, Stevens protects the rights he wants to protect, not protecting rights because they *are* rights.

There is another very important legal question involved in *McDonald*, which was seen in the most unusual spectacle of the plaintiff's attorneys arguing the case before the Court using two different theories of law. (That splitting of efforts and focus caused some to worry that the Court might somehow not come to the correct verdict in the case.)

These two theories involve whether to incorporate the Second Amendment into a broader (i.e. not just federal) right through the 14th Amendment's "Due Process" clause or through the "Privileges or Immunities" clause. Without getting into too much legal minutiae (although important minutiae), the Supreme Court could use either of these clauses to incorporate rights, but the Privileges or Immunities path offers, in the views of many libertarians and constitutional purists, the correct path and the best opportunity for

broadening liberty, especially economic liberty, based on a precedent that would overturn the *Slaughter House* cases of the late 1800s when the Court gutted that part of the 14th Amendment. You can read more about the legal debate in this interesting Reason analysis positing the two different views as pitting conservatives versus libertarians. The libertarian Cato Institute and the Institute for Justice both wrote *Amicus* briefs urging the court "to correct a long-standing error by restoring the Privileges or Immunities Clause...to its proper role as a source of federally protected individual rights."

In the end, only Justice Thomas took a forceful position in favor of this view, writing in his opinion that while our Second Amendment rights are "'fundamental' to the American 'scheme of ordered liberty,'" "I cannot agree that it is enforceable against the States through a clause that speaks only to 'process.' Instead, the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment's Privileges or Immunities Clause."

Unfortunately, even though Justice Scalia also expressed sympathy with this legal route, the plurality ended up incorporating our right to keep and bear arms through the Due Process clause which, as its name suggests, is better suited for matters that relate to process rather than fundamental rights.

Thomas gets it right again: "The notion that a constitutional provision that guarantees only 'process' before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words. Moreover, this fiction is a particularly dangerous one. The one theme that links the Court's substantive due process precedents together is their lack of a guiding principle to distinguish 'fundamental' rights that warrant protection from nonfundamental rights that do not."

Justice Thomas further argued that "This Court's substantive due process framework fails to account for both the text of the Fourteenth Amendment and the history that led to its adoption, filling that gap with a jurisprudence devoid of a guiding principle. I believe the original meaning of the Fourteenth Amendment offers a superior alternative, and that a return to that meaning would allow this Court to enforce the rights the Fourteenth Amendment is designed to protect with greater clarity and predictability than the substantive due process framework has so far managed." Thomas ended his opinion by stating that "the right to keep and bear arms is guaranteed by the Fourteenth Amendment as a privilege of American citizenship."

Almost without exception, each time he writes his own opinion we're reminded that Justice Thomas is our highest court's strongest champion for liberty and consistently truest defender of the Constitution.

In the meantime, Chicago and other localities will have to end their gun bans. It was the height of arrogance for them to maintain those bans after the *Heller* decision. But the fact that even after *Heller* the Court's four "liberals" could offer ways to say the Second Amendment only offers an individual right within the District of Columbia, as laughable as that is, shows that our nation's being under the "rule of law" is a tenuous situation at best.

Should even one of this Court's "conservatives" be replaced by a "liberal" judge, America could become a vastly different place, a place of rule of men rather than of law, a place where rights are judged by their popularity, a place where the Constitution comes to mean even less than it means already.

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